Office-Supreme Court, U.S.
FILED
APR 3 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 986

ANTHONY JOSEPH ZAMBITO, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GILBERT S. BACHMANN
Counsel for Petitioner

Counsel of Record:

GILBERT S. BACHMANN
1226 Chapline Street
Wheeling, West Virginia
JAMES A. BYRUM
Central Union Building
Wheeling, West Virginia
D. PAUL CAMILLETTI
Peoples Federal Building
Wheeling, West Virginia

March 28, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes involved	3
Statement of the Case	6
Statement of Facts	8
Reasons for Granting the Writ	10
Argument	12
I. The terms of Title 18, United States Code, Sections 1952 and 1953, are vague, uncertain and fail to set up an ascertainable standard and are incapable of being uniformly enforced	12
II. The United States Court of Appeals for the Fourth Circuit decided a federal question involved in this case by rendering an opinion which is in conflict with applicable principles of law contained in the decision of the United States Supreme Court in Ingram v. United States, 360 U. S. 672, 3 L. Ed. 2d 1503, 79 S. Ct. 1314	16
III. The decision rendered in this case by the United States Court of Appeals for the Fourth Circuit with reference to affirming the judgment of guilty as to petitioner's alleged violation of Title 18, United States Code, Section 1001, is in conflict with a decision rendered by the United States Court of Appeals for the Fifth Circuit styled Paternostro v. United States, decided November 7, 1962, 311 Fed. 2d 299	17
IV. The record presents a serious question whether Sections 1952 (Travel) and 1953 (Carries) of Title 18, United States Code, as related to the facts in this case, are two separate offenses consecutively punishable	18
Conclusion	19
Appendix A—Opinion Below	1a
Appendix B—Judgment of District Court	8a
Appendix C—Judgment of Circuit Court of Appeals	9a

AUTHORITIES

CASES: Page

Connaly v. General Construction Co., 269 U.S. 385; 46 S. Ct. 126 10
Dennis v. United States, 341 U.S. 494; 71 S. Ct. 857 .. 12
Dent v. West Virginia, 129 U.S. 114; 9 S. Ct. 231; 32 L. Ed. 623 16
Direct Sales Company v. U. S., 319 U.S. 703; 87 L. Ed. 1674; 63 S. Ct. 1265 17
Ingram v. United States, 360 U.S. 672; 3 L. Ed. 2d 1503; 79 S. Ct. 1314 .....2, 16, 17
Kay v. United States, 303 U.S. 1; 58 S. Ct. 468 (1938) 12
Lanzetta, et al. v. State of New Jersey, 306 U.S. 451; 59 Sup. Ct. 618 (1939) 11
Newbern, In Re, 350 Pac. 2d 116 11
Paternostro v. United States, 311 F. 2d 299 2
Pfeiffer Brewing Co. v. Bowles, Price Admr., 146 F. 2d 1006 10
Ollie Otto Prince v. United States, 352 U.S. 322; 77 S. Ct. 403 19

CONSTITUTION:

Fifth Amendment 3
Sixth Amendment 3
Fourteenth Amendment 3

UNITED STATES CODE:

Title 18, Sec. 2 .....4, 7, 16
Title 18, Sec. 371 16
Title 18, Sec. 1001 .....2, 4, 7, 18
Title 18, Sec. 1952 .....2, 4, 6, 7, 10, 12, 14, 15, 16, 18
Title 18, Sec. 1953 .....2, 4, 6, 7, 10, 12, 14, 16, 18
Title 28, Sec. 1254(1) 2

MISCELLANEOUS:

United States Code—Congressional and Administrative News, 87 Congress, Vol. 2, p. 2664 and 2634 .. 19
38 Corpus Juris Secundum—Gaming, Section 86 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

ANTHONY JOSEPH ZAMBITO, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Anthony Joseph Zambito, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on March 5, 1963.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit is unreported and is printed in the Appendix, page 1a. The Judgment of the UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT entered on March 5, 1963, is printed in the Appendix, page 9a. The Judgment of the United States Dis-

trict Court for the Northern District of West Virginia is printed in the Appendix, page 8a.

JURISDICTION

The Jurisdiction of the Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Sections 1952 and 1953 of Title 18, United States Code, Are Unconstitutional; Both Statutes Are Repugnant to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

2. The United States Court of Appeals for the Fourth Circuit Decided a Federal Question Involved in This Case By Rendering an Opinion Which Is in Conflict With Applicable Principles of Law Contained in the Decisions of the United States Supreme Court in Ingram vs. United States, 360 U. S.672, 3 L. Ed. 2d. 1503, 79 S. Ct. 1314.

3. The Decision Rendered in This Case by the United States Court of Appeals for the Fourth Circuit With Reference to Affirming the Judgment of Guilty as to the Petitioners Alleged Violation of Title 18, U. S. C., Section 1001, Is in Conflict With a Decision Rendered By the United States Court of Appeals for the Fifth Circuit, Styled, Paternostro vs. United States, Decided November 7, 1962, 311 F. 2d. 299.

4. The Record Presents a Serious Question, Whether Sections 1952 (Travel) and 1953 (Carries) of Title 18, United States Code, as Related to the Facts in This Case, are Two Separate Offenses Consecutively Punishable.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States of America

FIFTH AMENDMENT

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

FOURTEENTH AMENDMENT

ARTICLE XIV

Section 1.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Code—Title 18

§ 1001. Statements or Entries Generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, 62 Stat. 749.)

Title 18—U.S.C.—Section 2

PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(June 25, 1948, ch. 645, 62 Stat. 684; Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 717.)

U. S. Code—Title 18

Racketeering

§ 1952. Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises.

(a) Whoever travels in interstate of foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activit' ; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "Unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

(Added Pub. L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498)

U. S. Code—Title 18

Racketeering

§ 1953. Interstate Transportation of Wagering Paraphernalia.

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or

(b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(Added Pub. L. 87-218, § 1, Sept. 13, 1961, 75 Stat. 492.)

STATEMENT OF THE CASE

On December 13, 1961, ANTHONY JOSEPH ZAMBITO, the Petitioner, and five (5) others were arrested by Intelligence Agents of the Internal Revenue Service and at Wheeling, West Virginia were charged with violation of Title 18, United States Code, Sections 1952 and 1953. The Petitioner was arrested at his place of business called the Jolly Bar, which he owned and operated, situated at 1057 Market Street, Wheeling, West Virginia. Since 1950 the Petitioner operated a bar business on the first and second floors of said premises and resided in an apartment located on the third floor.

On March 15, 1962, a Grand Jury in the United States District Court for the Northern District of

West Virginia returned a Six Count Indictment against Anthony Joseph Zambito, Paul Hankish, Arthur C. Hale, Thomas Scarbor, Alfred Prim and James J. Rogerson, charging:

Count One: Charged all six Defendants with conspiring (18 U.S.C. 371) to violate Sections 1952 and 1953, Title 18, United States Code.

Counts Two through Five: Charged Zambito and certain other Defendants with substantive violations of Sections 1952 and 1953 relating said allegations to violation of Section 2(b).

Count Six: Charged Zambito alone with violation of Title 18, U.S.C. 1001 by the allegation that Zambito made a false representation of material fact in a Special Tax Return and Application for Registry-Wagering (Form 11-C) by stating "None" in response to question 5(b) concerning the number of employees and/or agents engaged in receiving wagers in his behalf.

All Six Defendants were tried together before a Jury. Midway during the Trial the Court disqualified and dismissed a Juror and replaced him with an alternate Juror. The Trial Court entered Judgments of Acquittal as to two of the Defendants, Prim and Scarbor. Motions for Judgments of Acquittal made on behalf of each of the other four Defendants were overruled and the Jury returned a Verdict of Not-Guilty as to Hankish and of Guilty as to Zambito, Hale and Rogerson on all Counts in which they were named. Hale and Rogerson were fined and placed upon probation. A Motion for a New Trial was filed on behalf of Zambito and was overruled. On June 15,

1962, Zambito was sentenced to serve a term of two years on each of the Six Counts; Sentences of Counts One and Six to run concurrently and sentences of Counts Two, Three, Four and Five to run concurrently, however, the two groups of concurrent sentences were ordered to be run consecutively resulting in a total sentence for a term of four years.

Zambito appealed to the United States Court of Appeals for the Fourth Circuit. On March 5, 1963, said United States Court of Appeals for the Fourth Circuit Affirmed the Judgment of the said United States District Court.

STATEMENT OF FACTS

On or about September 18, 1961, Anthony Joseph Zambito began to operate "numbers activity" from his theretofore established place of business known as the Jolly Bar situated at 1057 Market Street, Wheeling, West Virginia. In the parlance of such an activity Zambito was the owner or the "banker" and as such received bets recorded on "numbers slips" of bettors or customers which were solicited by "writers" or "runners;" the latter deducted a commission from moneys collected. Bettors or customers are never identified. Zambito knew that the numbers activity was illegal under the laws of the State of West Virginia. He now is awaiting sentence on a plea of guilty to a felony indictment charging a numbers violation in the Intermediate Court of Ohio County, West Virginia. He also knew that the State of Ohio had recently enacted more stringent penalties and that Congress had recently enacted laws providing serious penalties for interstate activity in connection with gambling. At the time Zambito began his numbers operation until his arrest on December 13, 1961, he believed that all of the bets that were being brought

to his place of business were solicited within the geographical boundaries of the State of West Virginia, that is, that he was conducting a purely intrastate operation within the proximate area of the City of Wheeling, West Virginia.

Previous to September 18, 1961, Zambito had never operated "numbers." Notwithstanding that John J. Snyder and John W. Fox, both residents of Martins Ferry, Ohio, who had owned and operated a numbers activity both in the State of Ohio and the State of West Virginia from their place of business situated in Martins Ferry, Ohio, and had furnished Zambito an adding machine, numbers books, etc., Zambito began a new and distinct numbers operation which he and he alone owned and controlled.

Zambito's numbers activity was a small operation. In the approximate three months period from September 18, 1961, to December 13, 1961, his gross receipts amounted to only Nine Thousand Dollars ($9,000.00). Zambito had no knowledge that the Co-Defendants, Hale and Rogerson, had solicited bets in the State of Ohio. There is no direct evidence that Zambito knew that Hale and Rogerson were soliciting bets outside of West Virginia and notwithstanding the Government Agents' lengthly surveillance the record shows that only an insignificant portion of the wagers written by Hale and Rogerson were solicited in Ohio.

REASONS FOR GRANTING THE WRIT

Sections 1952 and 1953, Title 18, United States Code, Are Unconstitutional; Both Statutes Are Repugnant to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States

I

SECTIONS 1952 AND 1953 OF TITLE 18, UNITED STATES CODE, DENY EQUAL PROTECTION OF THE LAW AND ARBITRARILY, CAPRICIOUSLY AND UNREASONABLY CREATE CLASS LEGISLATION.

THE STATUTES FAIL TO SET UP AN ASCERTAINABLE STANDARD AND ARE NOT SUFFICIENTLY EXPLICIT TO INFORM THOSE WHO ARE SUBJECT TO THE STATUTES WHAT CONDUCT ON THEIR PART WILL RENDER SUCH PERSONS LIABLE TO THE PENALTIES.

REFERENCE TO VARIOUS AND UNSPECIFIED STATE LAWS RENDERS BOTH STATUTES VAGUE, CAPRICIOUS AND INCAPABLE OF BEING UNIFORMLY ENFORCED.

A Statute creating a criminal sanction in order to satisfy constitutional requirements must conform to the principles enunciated in *Connaly* v. *General Construction Co.*, 269 U.S. 385; 46 S. Ct. 126:

> "That the terms of a Penal Statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a Statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essentials of due process of law."

Pfeiffer Brewing Co. v. *Bowles, Price Admr.*, 146 Fed 2d 1006—Jan. 26, 1945 Cert. Denied April 2, 1945:

"Equal protection of the law is the constitutional right of every American citizen. Indeed, it has frequently been said to be essential to due process of law guaranted by the Constitution. Amendment 5. In other words, legislation must be general in character upon the subjects to which it is related and enforceable in the usual modes adapted to the facts in the case. Dent v. W. Va. 129 U.S. 114, 9 S. Ct. 231; 32 L. Ed. 623. Class legislation discriminating against some and favoring others is prohibitive. But the rule does not prohibit or prevent classification which is reasonable, for, while the law must affect all persons in the same class and under similar conditions, classification based upon substantial distinction, with proper relation to the objects classified and the purposes sought to be achieved, if it does operate alike on all members of the class, is not special, discriminatory or class legislation. Obviously, classifications must embrace all who belong in the same category and may not be capricious or arbitrary."

Lanzetta, et al. v. *State of New Jersey*, 306 U.S. 451; 59 S. Ct. 618 (1939):

"The terms it (N. J. Statute punishing "Gangsters") purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."

In re: Emery Newbern, 350 Pac. 2d 116; . . . Cal. . . . Sup. Ct. of Cal.—March 8, 1960:

Defendant convicted under a Statute for vagrancy for being a common drunkard held, Statute unconstitutional because it was "vague, uncertain and incapable of being uniformly enforced."

Dennis v. *United States*, 341 U.S. 494; 71 S. Ct. 857:

> "Statutory provisions defining offenses or relating to the elements of an offense, or the prosecution or punishment therefor, may be so independent and separable that the invalidity or the unconstitutionality of one or more of them will not be held to affect the validity of the rest of the Statute."

Kay v. *United States*, 303 U.S. 1; 58 S. Ct. 468 (1938):

> "Statute (H. O. L. C.—False Statement) which fails to set up an ascertainable standard and is not sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" is vague and uncertain and offends the due process clause of the Constitution.

ARGUMENT

I

The terms of Title 18, United States Code, Sections 1952 and 1953, are vague, uncertain and fail to set up an ascertainable standard and are incapable of being uniformly enforced

Section 1952, contains multiple subjects of activity and conduct which may be succinctly classified into: Gambling, Liquor on which Federal Excise Tax has not been paid, Narcotics and Prostitution. The gravamen of this newly created Federal Criminal Sanction is:

> *Travel In Interstate . . . Commerce . . . with intent to* (1) *distribute proceeds . . ., or* (2) *commit any crime of violence, . . ., or* (3) *promote, . . . or facilitate . . ., of any unlawful activity, and thereafter performs* either of the acts in (1), (2), or (3).

The Statute attempts to define unlawful activity as:

> (1) *any business enterprise involving gambling* or interstate traffic in non tax paid liquor, narcotics

and prostitution offenses *in violation of the laws of the State in which they are committed or of the United States.*

While the language of the Statute may be sufficient on the condemned activities of liquor, narcotics and prostitution, we submit that in the area *involving gambling* the terms are vague, capricious and fail to set up an ascertainable standard and consequently are incapable of being uniformly enforced.

Of the multiple subjects encompassed by the Statute we are confining our position and argument to the one activity or subject, viz, "invoiving gambling."

Trafficking in non-paid Federal Excise Tax Liquor and as well also prostitution and narcotics offenses are clearly and distinctly defined in the respective deposits of law in all of the several States. But the offense of "gambling" is not universally nor uniformly condemned in the deposits of law of the several States. Forms of gambling are numerous and varied. 38 Corpus Juris Secundum—Gaming, Section 86 names and sets forth thirty-two different types or methods of gaming. Gambling is defined and prohibited in some States by specific criminal Statutes and in other States the definition of Gambling is found in the Common Law. In some States we find that Gambling is strictly prohibited under penalties of Criminal Sanctions. In other States Gambling is legal under numerous forms and some of the States issue licenses for the control of such activity.

Thus among the several States we find specific Statutes prescribing criminal penalties for activity involving Gambling yet in Nevada Gambling is not ille-

gal. A person traveling from a sister State to the State of Nevada and in so traveling in interstate commerce engages in conduct or activity sought to be condemned by Sections 1952 and 1953 would not be subject to the penalties of the Federal created Criminal Sanctions. Yet a person engaging in the same conduct or activity involving Gambling who travels to another State or States in the Union where Gambling is by Statute or by Common Law illegal and performs the identical activity as the above mentioned performed in Nevada, is subject to the severe criminal penalties of the Statutes.

For these reasons it is submitted that the subject Statutes by reference to such various and sundry State laws, both Statutory and Common Law, are rendered vague, capricious and fail to set up an ascertainable standard and are incapable of being uniformly enforced.

As to Section 1953, in some States the keeping or exhibiting of various and sundry types of gaming devices, e.g. slot machines, pinball machines, etc., are prohibited by Statutes which said State Statutes require reference to the Common Law decisions to find the applicable rules and laws which define Gambling as it applies to such a device. The references to such State Statutes and Common Law decisions are made necessary by reason of the fine lines of demarcation between Amusement devices and Gambling devices.

Other States permit the keeping and exhibiting of such Gambling devices under the regulations of the licensing powers of the State, County and Municipal Agencies of Government. Thus again we find a person who carries in Interstate Commerce any:

> record, paraphernalia, ticket, certificate, bill, slip, token, paper, writing, or other devices used, or to be used, or adapted, devised or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers policy, bolita, or similar game, shall be fined" etc.

and carries such mentioned items into a State where such activity is licensed is not subject to the criminal penalties of the Federal Statute; whereas, a person engaged in the identical conduct who carries such items into a State which prohibits such Gambling activity is subject to severe fine and imprisonment. The naming of the various and sundry items which are prohibited from being carried into Interstate Commerce covers such a vast and almost unlimited number of articles that it is impossible to determine which articles do and which articles do not violate the Statute.

Section 1952 in defining "unlawful activity" relates to a "business enterprise involving Gambling." As hereinbefore stated Gambling is susceptible to many and various definitions, both statutory and Common Law in the several States. A "business enterprise" is a very broad term and necessarily gives rise to many conjectural and speculative areas of activities which makes it almost juridically impossible to determine what functions do or do not constitute a "business enterprise." We respectfully submit that the terms are so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Also such terminology fails to set forth an ascertainable standard and is not sufficiently explicit to inform those who are subject to the Statute of the conduct on their part that will render such persons liable to the penalties.

II

The United States Court of Appeals for the Fourth Circuit decided a federal question involved in this case by rendering an opinion which is in conflict with applicable principles of law contained in the decision of the United States Supreme Court in Ingram v. United States, 360 U. S. 672. 3 L. Ed. 2d 1503, 79 S. Ct. 1314

There is no direct evidence in the record of this Case that Zambito KNEW that Hale and Rogerson were soliciting bets outside of West Virginia. In the *Zambito Case* the Government advanced the same theory as in the *Ingram Case*. The Government was unable to prove KNOWLEDGE by direct evidence but contended that the circumstances of intimate participation in a secret, illegal and profitable operation were sufficient to support the conviction.

The critical issue in the *Zambito Case* is the same issue as was adjudicated in the *Ingram Case*, that is, KNOWLEDGE. In the *Zambito Case* the issue is whether the evidence was sufficient to support the conviction which necessarily is a finding that Zambito had KNOWLEDGE that Hale and Rogerson solicited bets in Ohio and with such KNOWLEDGE he, Zambito, caused Hale and Rogerson to "travel" and "carry" in Interstate Commerce in violation of Sections 1952 and 1953, 371 and 2(b). In *Ingram*, the issue was whether the Defendants had KNOWLEDGE that a tax was due and whether with such KNOWLEDGE they willfully attempted to evade and defeat payment of the tax. The Supreme Court unanimously reversed the convictions of the Defendants on the ground that there was no direct evidence to show that the Defendants KNEW (1) that the principals were liable for a Gambling tax or (2) that the principals had not paid the tax. In concluding that the record "was completely barren of any di-

rect evidence of such KNOWLEDGE" (360 U.S. p. 678) the Court borrowed from its language in *Direct Sales Company* v. *United States*, 319 U.S. 703, p. 711, 87 L. Ed. 1674, p. 1681, 63 S. Ct. 1265:

> "Without the knowledge, the intent cannot exist . . . furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes." 319 U.S. 711.

We respectfully submit that although *Ingram* v. *United States*, was fully set forth in the Appellant's Brief below and orally presented during argument, the United States Court of Appeals for the Fourth Circuit completely ignored the *Ingram Case* and rendered an Opinion which is in direct conflict with the principles of law laid down therein by this Court.

III

The decision rendered in this case by the United States Court of Appeals for the Fourth Circuit with reference to affirming the judgment of guilty as to petitioner's alleged violation of Title 18, United States Code, Section 1001, is in conflict with a decision rendered by the United States Court of Appeals for the Fifth Circuit styled Paternostro v. United States, decided November 7, 1962, 311 Fed. 2d 299

Count Six charged that Zambito made a false representation of a material fact in a Special Tax Return, and Application for Registry-Wagering (Form 11-C) by stating "NONE" in response to Question 5(b) concerning the number of employees and/or agents engaged in receiving wagers in his behalf.

Paternostro v. United States involved a prosecution for knowingly and willfully making a false statement

to a Special Agent of the United States Internal Revenue Service and for perjury before a Grand Jury. The Fifth Circuit held that Defendant's negative answers to questions propounded by the Agent were insufficient to constitute statements within the Statute and reversed with directions to enter Judgment of Acquittal on Count One. At page 305 the Court of Appeals says:

> "At most, assuming that Appellant's answers to the Agent were proved to be false by believable and substantial evidence, considering all he said the answers were mere negative responses to questions propounded to him by an investigating Agent during a question and answer conference, not initiated by the Appellant. We conclude that the Court erred in failing to dismiss Count One of the Indictment."

In this case Zambito is alleged to have made a false representation of a material fact by answering "NONE." This constitutes a mere negative response to the questions propounded in Form 11-C and is not a statement calculated to pervert the legitimate functions of Government and consequently is not violative of Title 18, United States Code, Section 1001.

IV

The record presents a serious question whether Sections 1952 (Travel) and 1953 (Carries) of Title 18, United States Code, as related to the facts in this case, are two separate offenses consecutively punishable

The Government insists that the evidence and record sufficiently support a judgment entered upon a Verdict of Guilty on Counts Two through Five of the Indictment, namely: That it was proven by the evidence beyond a reasonable doubt that Zambito knowingly caused Hale and Rogerson, (Sec. 2(b)) to travel (Sec. 1952) with intent to *facilitate a business enter-*

prise involving gambling; and on the identical occasion to carry (Sec. 1953) *a slip designed for use in a numbers game.*

The Indictment charges Zambito in Counts 2 and 4 with traveling and in Counts 3 and 5 with carrying, all laid on the same day, December 13, 1961. Since the offense of carrying must necessarily involve the offense of traveling, conviction on both constitutes two convictions for one offense.

Zambito's conduct, if it be an offense, constitutes but one offense and not two consecutive offenses.

Ollie Otto Prince v. *United States*, February 25, 1957, 352 U.S. 322, 77 S. Ct. 403

UNITED STATES CODE, Congressional And Administrative News, 87 Congress, Vol. 2, p. 2664 and p. 2634

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GILBERT S. BACHMANN
Counsel for Petitioner

Counsel of Record:

GILBERT S. BACHMANN
1226 Chapline Street
Wheeling, West Virginia

JAMES A. BYRUM
Central Union Building
Wheeling, West Virginia

D. PAUL CAMILLETTI
Peoples Federal Building
Wheeling, West Virginia

March 28, 1963

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8711.

UNITED STATES OF AMERICA, *Appellee*,

versus

ANTHONY JOSEPH ZAMBITO, *Appellant*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA, AT WHEELING.
CHARLES F. PAUL, DISTRICT JUDGE.

(Argued January 7, 1963. Decided March 5, 1963.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BRYAN, Circuit Judges.

Gilbert S. Bachmann and D. Paul Camilletti (James A. Byrum on brief) for Appellant, and Robert E. Maxwell, United States Attorney, (John H. Kamlowsky, Assistant United States Attorney, and John P. Diuguid, Attorney, Department of Justice, on brief) for Appellee.

SOBELOFF, Chief Judge:

Together with five confederates, Anthony J. Zambito was indicted in the United States District Court for the Northern District of West Virginia for conspiracy and substan-

tive violations of the newly-enacted interstate racketeering statutes.[1] Five counts charged him, in essence, as a prin-

---

[1] "Sec. 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under the section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

"Sec. 1953. Interstate transportation of wagering paraphernalia

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel

cipal and accessory (18 U.S.C.A. sec. 2), with causing others to travel and to carry in interstate commerce gambling paraphernalia to be used in, and with intent to promote, an illegal numbers operation. A sixth count accused him of willfully misrepresenting a material fact on his wagering tax return in violation of 18 U.S.C.A. sec. 1001. A jury convicted him on all six counts and he was sentenced to a total of four years imprisonment.

As Zambito's major contention on this appeal is a challenge to the sufficiency of the evidence, a brief review of the pertinent facts is necessary. These are not in dispute.

Early in September, 1961, John Snyder and Joseph Fox decided to dispose of the illicit numbers business which for more than twenty years they had operated from headquarters in Martins Ferry, Ohio, covering the northern panhandle of West Virginia as well as parts of eastern Ohio. The recent passage of more stringent anti-gambling laws by the State of Ohio and the enactment of the above-mentioned federal statutes prompted their decision to pull up stakes. However, they wished to arrange for a successor in the enterprise. Their quest for one led them across the Ohio River to West Virginia, where they sought out Zambito, owner and proprietor of the Jolly Bar in Wheeling. After some initial hesitation, Zambito took over the business and, on September 18, 1961, Snyder and Fox delivered to him an adding machine, numbers books, scrap

---

materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia."

pads, and other sundry tools of the trade. What consideration, if any moved from the two Ohio men is not disclosed in the record.

For three months Zambito functioned as "banker" and controller of the operation, and daily he received the bets and numbers slips of customers solicited by "writers" or "runners" who worked for or with him on a percentage basis. Four of these had formerly written numbers for Snyder and Fox, and they now turned over their bets to Zambito and paid off winning customers with proceeds drawn from his Jolly Bar "bank." Two of these runners, co-defendants Arthur C. Hale and James Rogerson, resided in Ohio. On a daily schedule, they continued to accept numbers wagers from Ohio customers, crossed the Ohio River and banked the numbers slips and proceeds with Zambito in Wheeling. This pattern of operations lasted until December 13, 1961, when government agents raided the Jolly Bar, arrested Zambito and his associates, conducted a search of the premises, and confiscated money and gambling paraphernalia.[2] By Zambito's estimate, his gross receipts over the three-months period amounted to $9,000.

There is no denial that Zambito was engaged in gambling in violation of the West Virginia law. His argument is that the Government failed to show that he was aware of the Ohio source of the bets brought to him by Hale and Rogerson. Hale testified that Zambito had no knowledge that his numbers writing activities were conducted in Ohio. The Government, which had maintained a constant surveillance, concedes that Zambito was not observed in Ohio. There is no direct evidence that he knew that Hale and Rogerson were soliciting bets outside West Virginia, but the Government insists that a sound inference of such knowledge may be drawn from a "development and collocation of circumstances." *Glasser* v. *United States*,

[2] No question is raised as to the legality of the arrest or search.

315 U.S. 60, 80 (1942); *Williams* v. *United States*, 271 F.2d 703, 706 (4th Cir. 1959); *Blumenfield* v. *United States*, 284 F.2d 46, 53 (8th Cir. 1960).

There can be no doubt that the regular course of interstate activity, pursued continuously over a span of twenty years, was not substantially altered when Zambito gained control of the enterprise. The only noteworthy change after mid-September was in the name and location of the owner-banker. Zambito knew that the writers under the Snyder-Fox regime had regularly done business in both states. He was equally aware that severe penalties would attach to a continuation of such activity in Ohio, yet he exercised no supervision and made no inquiries during his constant association with his writers to assure himself that their established source of revenue in that state had been abandoned when he took over.

Is this to be construed as innocent naivite or calculated indifference on his part? Is it too speculative for a jury to draw the latter inference? We think not. The uninterrupted pattern of interstate activity and its perpetuation by writers with whom Zambito was in daily contact for three months were circumstances which fairly justify, if they do not compel, an inference of a common purpose to solicit and accept bets from any source without geographical limitation. See *United States* v. *Crimmins*, 123 F.2d 271, 273 (2d Cir. 1941); *cf.*, *Abbate* v. *United States*, 247 F.2d 410, 413 (5th Cir. 1957), *aff'd*, 359 U.S. 187 (1959). When a person engaged in an illegal business persistently disregards plain facts which are readily available to him, and there is an evident motive to ignore those facts, the law does not forbid a jury to reach the conclusion which rational men would reach in the circumstances. See *United States* v. *Starkey*, 52 F. Supp. 1, 3 (E.D. Ill. 1943); *United States* v. *Seligman*, 86 F. Supp. 114, 121 (W.D. Pa. 1949). *Cf.*, *Periera* v. *United States*, 347 U.S. 1, 12 (1954); *Corey* v. *United States*, 305 F.2d 232, 237 (9th Cir. 1962); *Pilgrim* v. *United States*, 266

F.2d 486, 488 (5th Cir. 1959); *Brubaker* v. *United States*, 183 F.2d 894, 898 (6th Cir. 1950).

Equally baseless is Zambito's contention that he was improperly convicted for making a false statement in his wagering tax return, wherein he answered "none" as to the number of persons accepting wagers on his behalf. The falsity of this statement is not controverted, but only its materiality.

While 18 U.S.C.A. sec. 1001 proscribes only those falsifications which pertain to material facts, *Paritem Singh Poonian* v. *United States*, 294 F.2d 74, 75 (9th Cir. 1961); *Gonzales* v. *United States*, 286 F.2d 118, 120 (10th Cir. 1960); *Freidus* v. *United States*, 223 F.2d 598, 601 (D.C. Cir. 1955), Zambito's statement manifestly falls within that category. Registration is as much a condition precedent to engaging in the business of accepting wagers as payment of the special occupational tax, *United States* v. *Kahriger*, 345 U.S. 22 (1953), and one so engaged is commanded by Congress to furnish "the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf." 18 U.S.C.A. sec. 4412(a)(2). By compelling the principal to disclose allied personnel such as writers, who may be likewise subject to the occupational tax, 18 U.S.C.A. sec. 4411, this provision assures the collection of revenue where the cloak of anonymity might otherwise enhance the possibility of tax evasion. Fraudulent concealment of names and addresses not only tends to obstruct the administration of a valid tax measure, *cf.*, *Ogden* v. *United States*, 303 F.2d 724 (9th Cir. 1962); *United States* v. *Stark*, 131 F. Supp. 190 (D. Md. 1955), but here it also disguised the Ohio source of Zambito's own income which the disclosure of names and addresses might have revealed. See *United States* v. *Shaffer*, 291 F.2d 689, 692 (7th Cir. 1961).

Zambito further complains of a typographical error in the indictment which stated October 23, 1962, rather than

1961, as the date of his false statement. This obvious clerical mistake was in no way prejudicial. As the 1962 date had not yet arrived, and as he was not in the business before 1961, the intent of the indictment could not have misled anyone. Rule 52(a), F.R.Cr.P.; *Lucas* v. *United States*, 188 F.2d 627, 628 (D.C. Cir. 1951); *Lund* v. *United States*, 19 F.2d 46, 47 (8th Cir. 1927). *Cf., Stillman* v. *United States*, 177 F.2d 607, 611 (9th Cir. 1949).

Nor is there any conceivable merit in the final argument that the District Court erred when midway through the trial it dismissed a juror who belatedly admitted in chambers that he had not truthfully responded to the Judge's inquiry on voir dire as to whether a federal gambling stamp had been issued to him or to a member of his family. The court's action was clearly warranted by the circumstances, particularly in the absence of any showing or even a claim of prejudice. Rule 24(c), F.R.Cr.P.; *Gillars* v. *United States*, 182 F.2d 962, 980 (D.C. Cir. 1950); *United States* v. *Goldberg*, 206 F. Supp. 394 (E.D. Pa. 1962). The impartiality of the jury which tried the defendant is conceded; he did not suffer by the exclusion of a juror whom he may or may not have thought biased in his favor.[3] *Puff* v. *United States*, 211 F.2d 171, 184-85 (2nd Cir. 1954).

Affirmed.

[3] The dismissed juror was replaced by the first alternate chosen at the beginning of the trial.

APPENDIX B

Final Judgment

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

No. 7332

INDICTMENT, Violation T. 18,
Secs. 1952, 1953, 2, 371, 1001, USC.

UNITED STATES OF AMERICA

v.

ANTHONY JOSEPH ZAMBITO

On this 15th day of June 1962, came the attorney for the government and the defendant appeared in person and by counsel.

It is ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offenses of carrying in interstate commerce papers, etc. to be used to promote gambling and traveling in interstate commerce with intent promote, manage and carry on unlawful activity involving gambling, numbers operations, etc.; and making false statement re special tax return and application for registry, as charged in counts 1, 2, 3, 4, 5 and 6, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is ADJUDGED that the defendant is guilty as charged and convicted.

It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) YEARS upon Count 1; Two (2) YEARS upon Count 6; said sentences upon Counts 1 and 6 to run concurrently; Two

(2) YEARS upon Count 2; Two (2) YEARS upon Count 3; Two (2) YEARS upon Count 4 and Two (2) YEARS upon Count 5; said sentences upon Counts 2, 3, 4 and 5 to run concurrently; and said sentences on Counts 2, 3, 4 and 5 to run consecutively to the sentences imposed upon Counts 1 and 6; making a total sentence of FOUR (4) YEARS in this Indictment.

It is ORDERED that the execution of this Judgment be stayed for a period of ten (10) days, and that the defendant surrender himself to the United States Marshal for this District on June 25, 1962, for Commitment.

It is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

CHARLES F. PAUL,
United States District Judge.

APPENDIX C

Judgment

Filed and Entered March 5, 1963.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8711

UNITED STATES OF AMERICA, *Appellee,*

v.

ANTHONY JOSEPH ZAMBITO, *Appellant.*

APPEAL FROM the United States District Court for the Northern District of West Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of West Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

ALBERT V. BRYAN
United States Circuit Judge.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	8
Conclusion	13

CITATIONS

Cases:

Bohn v. *United States*, 260 F. 2d 773, certiorari denied, 358 U.S. 931	8
Boyce Motor Lines, Inc. v. *United States*, 342 U.S. 337	9-10
Corey v. *United States*, 305 F. 2d 232	11
Ingram v. *United States*, 360 U.S. 672	10
Paternostro v. *United States*, 311 F. 2d 298	12
Pereira v. *United States*, 347 U.S. 1	11
Roth v. *United States*, 354 U.S. 476	10
United States v. *Crimmins*, 123 F. 2d 271	11
United States v. *Petrillo*, 332 U.S. 1	10
United States v. *Starkey*, 52 F. Supp. 1	11

Statutes:

18 U.S.C. 2	4
18 U.S.C. 13	9
18 U.S.C. 371	5
18 U.S.C. 1001	4, 5, 12, 13
18 U.S.C. 1073	9
18 U.S.C. 1262	9
18 U.S.C. 1952	2, 4, 5, 8
18 U.S.C. 1953	3, 5, 8, 9
26 U.S.C. 4411	12
26 U.S.C. 4412	12

Miscellaneous:

Hearings on S. 1653-1658, 1665, *Committee on the Judiciary*, U.S. Senate, 87th Congress, 1st sess.	8

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 986

ANTHONY JOSEPH ZAMBITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1963 (Pet. App. 9a). The petition for a writ of certiorari was filed on April 3, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provisions of 18 U.S.C. 1952 and 1953, prohibiting interstate activity involving gambling illegal under state law, are unconstitutionally vague and incapable of uniform enforcement by reason of the variances in state anti-gambling laws.

2. Whether the jury could properly find, on the basis of evidence showing that petitioner took over the "banking" activities of a numbers business operating in two states, that petitioner had knowledge that runners, in the course of collecting wagers for him, were crossing state lines.

3. Whether petitioner was properly convicted for causing the traveling in interstate commerce with intent to promote a numbers business, and in the course of the same transaction, causing the carrying of numbers slips in interstate commerce.

4. Whether, on a federal application for wagering registry, the entry of the word "None", an untrue response to an inquiry as to the number of agents receiving wagers for the applicant, constituted a false statement of a material fact within the meaning of 18 U.S.C. 1001.

STATUTES INVOLVED

Title 18 of the United States Code, Section 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

Title 18 of the United States Code, Section 1953 provides in pertinent part:

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials

used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

Title 18 of the United States Code, Section 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

A six-count indictment returned in the United States District Court for the Northern District of West Virginia charged petitioner and others with offenses growing out of illegal interstate gambling activity. Counts 2 and 4 charged that petitioner on December 13, 1961, caused others (see 18 U.S.C. 2) to travel in interstate commerce from separate points in Ohio to Wheeling, West Virginia, with intent to promote a numbers operations, unlawful under state law, and with an attempt thereafter to carry on such unlawful activity in violation of 18 U.S.C. 1952.

Counts 3 and 5 charged that petitioner, on the same date, caused others to carry numbers paraphernalia between the points described in violation of 18 U.S.C. 1953. Count 1 charged a conspiracy (18 U.S.C. 371) to commit the substantive offenses condemned by 18 U.S.C. 1952 and 1953. Count 6 charged petitioner with falsely representing a material fact on a wagering tax return in violation of 18 U.S.C. 1001 (App. 6-13).[1]

After a trial by jury, petitioner was found guilty on all counts. He was sentenced to imprisonment for a period of two years on each of the counts, the terms on counts 1 (the conspiracy) and 6 (the false statement count) to run concurrently, and the terms on counts 2 through 5 (the substantive counts) to run concurrently with each other but consecutively to the terms imposed upon counts 1 and 6 (App. 2-3).

The evidence, developed through government and defense witnesses alike, and largely undisputed, is as follows:

In early September 1961, two numbers "bankers" of Martin's Ferry, Ohio, disturbed by the enactment of strict anti-gambling laws by the state of Ohio as well as federal laws prohibiting interstate gambling activity, decided to disassociate themselves from the illicit business which they had operated for more than twenty years with the help of "writers" or "runners" collecting bets in Ohio and northern West Virginia. Because they did not want to leave these

[1] Unless otherwise indicated "App" refers to the appellants' appendix in the court below. "Tr." refers to the transcript of trial proceedings lodged herewith.

"runners" without a "bank", they approached petitioner, the owner of the Jolly Bar in Wheeling, West Virginia, with respect to taking over the business, discussing with petitioner the laws in question. After some initial hesitation, petitioner agreed to take over and, on September 18, 1961, began operations with numbers books and other paraphernalia delivered to him by the Ohio bankers (Tr. 168-208; 362-376).

Petitioner operated as a "banker" for three months, daily receiving customer wagers and number slips delivered to him at the Jolly Bar by runners working on a percentage basis. All of the runners had "hits" during this period and paid off the winning customers with proceeds from petitioner's bank. Petitioner's four regular runners had formerly written numbers for the Ohio bankers. Two of the runners, Hale and Rogerson, had resided in Ohio for many years. While the evidence is not clear as to whether they had always made Ohio collections,[2] it is undisputed that, during the period of petitioner's operation through December 13, 1961, Hale and Rogerson would as a daily procedure collect wagers from Ohio customers,

---

[2] Snyder, one of the Ohio bankers, testified that during the period when he and his partner, Fox, operated the bank in Ohio, Hale, if he did make collections in Ohio, wrote "very, very few". He did not know about Rogerson (Tr. 207). Fox testified that neither Hale nor Rogerson at this time wrote numbers in Ohio (Tr. 371), but later admitted "As a matter of fact, we didn't know where they got their business from" (Tr. 376). Hale testified that when writing for the Ohio bankers he did not make Ohio collections but began to do so without petitioner's knowledge, when petitioner took over the bank (Tr. 429). Rogerson, a codefendant (as was Hale) did not take the stand.

cross the Ohio River and bank the slips and proceeds with petitioner in West Virginia. On December 13, 1961, government agents raided the Jolly Bar, arrested petitioner and his associates, conducted a search of the premises and confiscated money and gambling paraphernalia. By petitioner's estimate, gross receipts for the three month period totalled $9,000 (Tr. 441-464; 29-138).

Petitioner testified that he did not know that Hale and Rogerson were picking up wagers in Ohio. In a motion for judgment of acquittal he argued that the government had failed to show that he had knowledge of the interstate character of his operations (Tr. 468-469). The court overruled the motion. In its instructions to the jury, discussing the charges that petitioner caused others to travel in interstate commerce in the promotion of unlawful activities, the court said (Tr. 493-494):

> * * * You will note that for a finding of guilty as to Zambito in this respect, it would be necessary for you to find either that Zambito knew of the writing of numbers in Ohio on the particular occasion, or that he knew of such writing of numbers on former occasions and was indifferent as to the place where the numbers had been written or of the source of business. Only if you find such knowledge will you be able to find that Zambito either induced the violations by Hale and Rogerson or caused them.

Similarly, the court instructed that the jury must find that Zambito knowingly induced or caused the carrying of numbers slips between the states of Ohio and West Virginia.

ARGUMENT

1. Petitioner for the first time in this Court urges (Pet. 12-15) that Sections 1952 and 1953 of Title 18 U.S.C. are unconstitutionally vague and capricious. He does not specifically challenge the wording of the statutes as vague; rather, the main thrust of his argument appears to be that since gambling is variously defined and controlled by the several states, the federal statutes, to the extent that they prohibit conduct involving a violation of state law, are uncertain and incapable of being uniformly enforced. There is no merit to this contention. Insofar as Section 1952 is pertinent here, it proscribes interstate travel in promotion of defined unlawful activity. The "unlawful activity" is not simply a business enterprise involving gambling but a "business enterprise involving gambling * * * offenses *in violation of the laws of the State in which they are committed* * * *" (see subsection (b), p. 3 *supra*, emphasis supplied). There is nothing difficult of interpretation as to the conduct thus prohibited. A "business enterprise" is a term of common usage. See, e.g., *Bohn* v. *United States*, 260 F. 2d 773 (C.A. 8), certiorari denied, 358 U.S. 931. The particular gambling offense involved is either legal or illegal under the law of the State where the crime was committed. The whole purpose of the statutes (and the legislative history of the Act makes this abundantly clear) was to assist the States in the enforcement of local laws. See *Hearings* on S. 1653-1658, 1665, *Committee on the Judiciary*, U. S. Senate, 87th Congress, 1st sess. It is of

no import that these laws might vary as between the several States. There is no constitutional objection to Congress specifying that a federal statute will come into operation in conjunction with various unnamed state or federal offenses. See 18 U.S.C. 1262 prohibiting the transportation of intoxicating liquors into states which prohibit the sale of such liquor. See also 18 U.S.C. 1073 (Fugitive Felon Act) and 18 U.S.C. 13 (Assimilative Crimes Statute).

As to Section 1953, the recitation of items that are forbidden to be carried in interstate commerce (as "record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing or other device used * * *") is detailed; the gambling activities with respect to which such items must be used, adapted, devised or designed for use in order to fall within the prohibition (bookmaking, sporting event wagering pools, and numbers) are specifically set forth. The section is made inapplicable by express terms (see subsection b) to certain parimutuel and sporting event betting materials to be used in States where such betting is legal, and to newspapers.

The legislative history of this section shows that the lengthy itemization of proscribed articles was deliberate. Congress intended to insure that anything designed to be used in the enumerated gambling activities should be swept from the channels of interstate commerce. Its broad coverage as such does not go to the question of constitutionality.

The basic issue is whether this legislation adequately gives notice of the required conduct to one who would avoid its penalties. See *Boyce Motor Lines,*

Inc. v. *United States*, 342 U.S. 337; *United States* v. *Petrillo*, 332 U.S. 1; *Roth* v. *United States*, 354 U.S. 476. The legislation here provides ample warning as to the conduct which falls within its ban. Certainly petitioner, in the circumstances of this case, has no basis for a claim of vagueness or uncertainty. There is no question that the numbers activity which he promoted was unlawful under the laws of West Virginia, the State in which he operated, or that the numbers slips which he caused to be transported are forbidden to interstate commerce.

2. Petitioner, relying upon *Ingram* v. *United States*, 360 U.S. 672, argues (Pet. 16-17) that the government did not adequately prove that he knew that the codefendants Hale and Rogerson were soliciting wagers outside West Virginia. The evidence showed that petitioner, as the proprietor of the business, dealt with two writers who had lived in Ohio for a substantial number of years. He himself testified that he knew Rogerson lived in Ohio (Tr. 451). He was in daily contact with these writers for a period of three months, accepting the slips and proceeds they tendered and paying from his bank the sums necessary to pay off their "hits". Petitioner knew that the writers in the business which he took over had regularly collected wagers from customers in both States. He was aware that severe penalties might follow from a continuation of the collections in Ohio. Yet he exercised no supervision and made no inquiries to insure that there was no longer an Ohio source of revenue when he took over. As the court below noted, these circumstances fairly justify

if they do not indeed compel, an inference of a common purpose to solicit and accept bets from any source without geographical limitations. See *United States* v. *Crimmins*, 123 F. 2d 271, 273 (C.A. 2); *Pereira* v. *United States*, 347 U.S. 1, 12; see also *Corey* v. *United States*, 305 F. 2d 232, 237 (C.A. 9); *United States* v. *Starkey*, 52 F. Supp. 1, 3 (E.D. Ill.).

The *Ingram* case gives no support to petitioner's position. There this Court held that two minor clerical employees of a numbers operation illegal under state law were improperly convicted of a conspiracy to evade the payment of federal wagering taxes in the absence of evidence that they knew their principals (whose convictions were affirmed) were liable for, or had not paid, the taxes. Here petitioner was the entrepreneur and, as noted above, there was a sound basis in the evidence for the inference that he had knowledge of the interstate activities of the writers for whom he acted as banker.

3. Little need be said with respect to petitioner's contention (Pet. 18-19) that he could not be punished consecutively for causing travel in interstate commerce with intent to promote a numbers business and for causing, upon the same occasion, the carrying of numbers slips in interstate commerce. The fact is that petitioner's sentences on the substantive offenses of counts 2 through 5 were imposed to run concurrently. Thus, even if there were a serious question as to whether the offenses involved separate elements and might be separately punished, there would be no occasion to reach that issue in this case.

4. Petitioner also argues (Pet. 17-18) that his entry of the word "None" in response to a question on his application for registry-wagering, as to the number of employees and/or agents engaged in receiving wagers on his behalf, was not a falsification of a material fact within the meaning of 18 U.S.C. 1001. Congress obviously regarded the information as material since the statute, 26 U.S.C. 4412(a)(2), specifically requires persons registering as engaged in the business of accepting wagers to furnish the name and place of residence of each person engaged in receiving wagers for him or on his behalf. Petitioner's false statement was calculated to pervert the legitimate functions of government. As the court below noted, the fraudulent concealment of names and address of other personnel—such as writers who might be subject to occupational tax liability (26 U.S.C. 4411)—tends to obstruct the administration of a valid tax measure.[3]

---

[3] *Paternostro* v. *United States*, 311 F. 2d 298 (C.A. 5), relied upon by petitioner is wholly inapposite. There, the defendant, in the course of an investigation, had been placed under oath and had answered questions propounded to him by a government agent. The Fifth Circuit held that under those circumstances, where the accused did not initiate any positive or affirmative statement calculated to pervert the legitimate functions of government, his negative responses during the question and answer conference were not "statements" within the meaning of 18 U.S.C. 1001. This is very different from giving false response to answers required by statute for registration.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

MAY 1963

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 684768 1119